86-605

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM

LAWRENCE E. KEVAL,
Petitioner,

vs.

HON. CASPAR WEINBERGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LAWRENCE E. KEVAL
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LAWRENCE E. KEVAL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion in the United States Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED

Did the court commit error by ruling that the Appellant failed to establish a prima facie case as to age discrimination and reprisal.

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OPINION BELOW

The opinion of the Court of Appeals (unreported) appears in the Appendix. The opinion held that the lower court properly dismissed the action at the end of the plaintiff's case.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 15, 1986. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(v).

STATEMENT OF THE CASE

On September 26, 1984, petitioner, Lawrence E. Keval, filed a complaint in the United States District Court for the Eastern District of Virginia. The complaint charged that Mr. Keval was not hired by the Defense Criminal Investigative Service because the Service had a pattern and practice of hiring younger, less qualified persons. Mr. Keval at the time he sought employment was forty-three and forty-four years old. There were multiple job vacancies. The suit was brought under the Age Discrimination in employment and retaliation/reprisal., Mr. Keval also claimed that he was not hired because a member of the selecting process knew that petitioner had filed an age discrimination complaint earlier.

Mr. Keval properly filed administrative complaints alleging age discrimination and reprisal.

Based on his belief that he was the victim of age discrimination and reprisal, Mr. Keval sought relief in the United States District Court for the Eastern District of Virginia. Trial was held before The Honorable Richard L. Williams, United States Judge. At the close of the plaintiff's testimony, the government moved for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure claiming that Mr. Keval had failed to establish a prima facie case. The Court granted the government's motion. A copy of his order can be found in the appendix.

After appeal, the United States Court of Appeals affirmed the dismissal.

REASONS FOR GRANTING THE WRIT

The writ should be granted because Mr. Keval was denied his rights under due process. He established a

prima facie case in the area of age discrimination and retaliation.

In order to establish a prima facie case of age discrimination, the Supreme Court in *McDonnell Douglas* v. *Green,* 411 U.S. 792 (1973) at 800 held that this burden is generally met by showing that:

> (1) plaintiff belongs to the protected minority;
>
> (2) that he applied and was qualified for a job which the employer was seeking applicants;
>
> (3) that despite his qualifications he was rejected; and
>
> (4) that, after his rejections, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. See also *Garner* v. *Boorstin,* 690 F.2d 1034 (D.C. Cir. 1982).

Appellant submits that he has met that burden. He demonstrated that he was in the protected age group (40-70); he showed he was qualified for the positions available because of his previous experience as a GS-1811 criminal investigator and that persons who were not in the protected age group were hired and their qualifications were equal.

In addition, the appellant contends that he also met the burden of establishing a prima facie case as to reprisal. In order to establish the prima facie case of reprisal: The EEOC regulations at 29 C.F.R. § 1613.261(a) (1980) provide in part:

> "[c]omplainants . . . shall be free from restraint, interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage . . . or any time thereafter."

The methods and burdens of proof enunciated in *McDonnell Douglas, supra,* have been applied to . . . claims of retaliation. *Hochstadt* v. *Worcester Foundation,* 425 F. Supp. 318, 324 (D. Mass. 1976), *aff'd,* 545 F.2d 222 (1st Cir. 1976).

In order to establish a case of retaliation violative of the Act, Complaint must prove three elements:

> (1) protected participation or opposition under [the Act] known by the retaliator;
>
> (2) an employment action or actions disadvantaging him after engaging in protected activities; and
>
> (3) a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions.

Appellant states that he has also met this burden for he showed that he was engaged in a protected activity, i.e., the filing of an EEO complaint, it was known to Mr. Copperthwait and that this information was made known to other selecting officials and that he was not hired.

The Court in its ruling dismissing the case relied on the opinion of this Court in *Young* v. *Lehman,* 748 F.2d 194 (4th Cir. 1984) but appellant contends that his case can be distinguished from that opinion in a significant manner.

In *Young* the Court found that the Appellant did establish a prima facie case and that finding was upheld by the Court. Appellant Keval's testimony at trial showed that he met the four standards articulated in *McDonnell Douglas.* He introduced the statistics that are contained in the appendix to demonstrate the small number of persons over 40 which were hired under the vacancy announcements by the Defense Criminal Investigative Service. Ap-

pellant is of the opinion that the Court misapplied the decision in *Young*.

Appellant on page 19 of the transcript referred to the investigative files which were part of the case and pointed out that in some instances no one over 40 was hired.

The ruling of the Trial Court and affirmance by the Appellate Court was clearly error and violated this court's rulings in *McDonnell Douglas, supra.*

Reliance upon the affidavit claiming no reprisal constituted a virtual hearing on the merits without subjecting the affiant to cross-examination.

The record is clear that Mr. Keval should have a trial on the merits.

Respectfully submitted,

LAWRENCE E. KEVAL
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(301) 262-8289

October 14, 1986

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LAWRENCE E. KEVAL 12632 Millstream Drive Bowie, MD 20715	:	
Plaintiff	:	
	:	Civil Action
v.	:	No. 84-0991-A
HONORABLE CASPAR WEINBERGER In his official capacity as Secretary of Department of Defense Pentagon Washington, D.C. 20301	:	
and	:	
DEFENSE CRIMINAL INVESTIGATIVE SERVICE Cameron Station Alexandria, VA	:	COMPLAINT: EMPLOYMENT DISCRIMINATION BASED ON AGE
Defendant	:	

COMPLAINT

1. This Court has jurisdiction over this matter by virtue of 42 USC 2000(e)-16C and 2000(e)-5, 42 USC 1981, 28 USC 1343, 1361, Executive Order 11478 and the Fifth and Fourteenth Amendments to The Constitution of the United States.

2. Plaintiff is an adult citizen of the United States and a resident of the State of Maryland. At all times relevant to this complaint, he was over the age of 40, his birthdate be-

ing May 20, 1938. He has extensive educational background and experience as an investigator in the federal service.

3. Plaintfiff filed a timely application for employment as a Criminal Investigator with the defendant Defense Criminal Investigative Service for the vacancy announcements GS-1811 - 7/9/11, 12, & 13 opening date being 17 August 1981.

4. Plaintiff also filed a timely application for vacancy announcement 187-82, 188-82, and 189-82 also for Criminal Investigative vacancies with the Defendant DCIS.

5. Despite his superior qualifications, job experience and background, plaintiff was not selected for any of the above announced vacancies.

6. Other applicants, less qualified but younger in age were selected for these vacancies.

7. Plaintiff has exhausted his administrative remedies.

Plaintiff alleges the following:

(a) That he was and is well qualified or better qualified than those persons selected for employment at the GS 5/7/9/11 and 12 levels.

(b) That he was not selected for employment because of his age being over the age of 40.

(c) That he was not selected for employment because he had earlier filed complaints of age discrimination with the Department of Defense and other agencies and that his non-selection was also because of this reprisal.

(d) That the DCIS agency has a pattern and practice of age discrimination in their selecting process for Criminal Investigators at the GS 5, 7, 9, 11 and 12 levels.

WHEREFORE, the premises considered, Plaintiff prays that this Honorable Court order:

1. That he be immediately placed for employment at the DCIS as a Criminal Investigator at an appropriate level.

2. That he receive back pay and prorated benefits and status from December 3, 1981.

3. That he recover attorney fees and costs.

4. Such other and further relief as the Court deems fit and proper.

Respectfully submitted,

/s/ John L. McGann
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Attorney for Plaintiff

FILED
SEP 2 1984
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

LAWRENCE KEVAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-991-A
	)	
CASPAR WEINBERGER,	)	
	)	
Defendant.	)	

ORDER

This matter came before the Court on a trial to the bench on August 7, 1985. At the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict under Rule 41(b). For the reasons stated from the bench, the motion is GRANTED and the case is hereby DISMISSED.

Let the Clerk send a copy of this order to all counsel of record.

DATE: Aug. 7, 1985

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

AUG 7 1985
Copies sent

UNITED STATES COURT OF APPEALS
[unpublished] FOR THE FOURTH CIRCUIT

No. 85-2069

Lawrence E. Keval,

Appellant,

versus

Hon. Caspar Weinberger in his official capacity as Secretary of Dept. of Defense; Defense Criminal Investigative Service,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A 84-991-A)

Argued February 7, 1986 Decided July 15, 1986

Before RUSSELL and PHILLIPS, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge

Charles A. Kubinski for Appellant; Paula M. Potoczak, Assistant United States Attorney (Justin W. Williams, United States Attorney on brief) for Appellee.

PER CURIAM:

Lawrence E. Keval applied in 1981 and 1982 for a criminal investigator position in the Defense Criminal Investigative Service. He was 43 at the time of his first ap-

plication and 44 at the time of his second. The DCIS formed three three-person panels to evaluate the applications for each position offered and to establish a list of highly qualified applicants. Keval's scores were well beneath the cut-off scores set by the panels, and he did not make the highly qualified list.

Keval brought this action in September 1984 alleging, inter alia, age discrimination and retaliation. He claimed that the DCIS hired younger, less qualified persons to fill the vacancies that it denied him because he was over forty. He based his retaliation claim on the fact that one member of two panels knew he had previously filed a discrimination complaint against the Department of Agriculture. At the close of his case the district court dismissed his action under Fed. R. Civ. P. 41(b).

We affirm the district court's dismissal. Keval failed to prove he was as qualified as those who made the highly qualified lists, several of whom apparently were forty or older. *See Young v. Lehman,* 748 F.2d 194, 198 (4th Cir. 1984); *see also Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir. 1980) (plaintiff's perception of his own qualifications is not relevant). He also failed to prove any causal connection between his previous discrimination complaint against the Department of Agriculture and his low ranking. *See Ross v. Communications Satellite Corp.,* 759 F.2d 355, 365 (4th Cir. 1985). The suspect panelist stated in a sowrn affidavit that he rated Keval fairly, and there was little variance among all the panelists' evaluation of Keval. In the face of this documentary evidence, Keval's mere assertion that there was retaliation is insufficient to establish the necessary causal link.

AFFIRMED

JUDGEMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2069

Lawrence E. Keval,

Appellant,

vs.

Hon. Caspar Weinberger in his official capacity as Secretary of Dept. of Defense; Defense Criminal Investigative Service,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacea
CLERK

FILED
JUL 15 1986
U.S. COURT OF APPEALS
FOURTH CIRCUIT